

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Implementation of the Subscriber Carrier)
Selection Changes Provisions of the) CC Docket No. 94-129
Telecommunications Act of 1996)
)
TXU Communications Telecom Services)
Company dba TXU Communications)
Petition for Waiver)

ORDER

Adopted: July 6, 2000

Released: July 7, 2000

By the Associate Division Chief, Accounting Policy Division, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. In its *Carrier Change Orders*,¹ the Commission adopted rules applicable to carriers changing a consumer's preferred carrier.² In this Order, we grant TXU Communications Telecom Services Company dba TXU Communications (TXU Communications) a limited waiver of the authorization and verification requirements of the Commission's rules and *Carrier Change Orders*.³ We grant this limited waiver to the extent necessary to enable TXU

¹ *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Further Notice of Proposed Rule Making and Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 10674 (1997), Second Report and Order and Further Notice of Proposed Rule Making, 14 FCC Rcd 1508 (1998) (*Section 258 Order*); *stayed in part, MCI WorldCom v. FCC*, No. 99-1125 (D.C. Cir. May 18, 1999); *First Order on Reconsideration*, FCC 00-135 (released May 3, 2000); *stay lifted, MCI WorldCom v. FCC*, No. 99-1125 (D.C. Cir. June 27, 2000); *reconsideration pending; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Report and Order, 10 FCC Rcd 9560 (1995), *stayed in part*, 11 FCC Rcd 856 (1995); *Policies and Rules Concerning Changing Long Distance Carriers*, CC Docket No. 91-64, 7 FCC Rcd 1038 (1992), *reconsideration denied*, 8 FCC Rcd 3215 (1993) (*PIC Change Recon. Order*); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, 101 F.C.C.2d 911 (*Allocation Order*), 101 F.C.C.2d 935 (*Waiver Order*), *reconsideration denied*, 102 F.C.C.2d 503 (1985) (*Reconsideration Order*) (the *Reconsideration Order* denied reconsideration of both the *Allocation Order* and the *Waiver Order*). We refer to these orders collectively as the *Carrier Change Orders*.

² 47 C.F.R. §§ 64.1100 - 64.1190.

³ On April 14, 2000, TXU Communications filed a Request for Expedited Waiver of Commission Rules relating to TXU Communications' acquisition of the customer base of Network Operator Services Inc. dba Network Long Distance (Network Long Distance) (Waiver Petition). TXU Communications supplemented the (continued....)

Communications to become the preferred carrier of approximately 1,800 consumers currently presubscribed to Network Long Distance, without first obtaining the consumers' authorization and verification.

2. Section 258 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, makes it unlawful for any telecommunications carrier to "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such procedures as the Commission shall prescribe."⁴ The goal of section 258 is to eliminate the practice of "slamming," the unauthorized change of a subscriber's preferred carrier. Pursuant to section 258, carriers are absolutely barred from changing a customer's preferred local or long distance carrier without first complying with the Commission's verification procedures.⁵ In the *Section 258 Order*, the Commission revised its procedures to ensure that carriers obtain the requisite authority prior to changing a customer's preferred carrier. The Commission requires that carriers follow one of the Commission's prescribed verification procedures before submitting carrier changes on behalf of consumers.⁶

3. TXU Communications seeks a waiver of our verification rules to allow TXU Communications to be designated the preferred long distance carrier for the customers of Network Long Distance without first obtaining each customer's authorization and verification. Because we conclude that, under the circumstances presented, it is in the public interest to grant the waiver, we grant TXU Communications a waiver, subject to the conditions represented in its filings.

II. DISCUSSION

4. Generally, the Commission's rules may be waived for good cause shown.⁷ As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.⁸

Waiver Petition and its Attachments A and B with amended versions of Attachment B on June 6 and June 8, 2000 (Supplement and Further Supplement, respectively). The June 6, 2000 Supplement also contained a commitment that the affected customers would not be assessed any preferred carrier change charges as a result of the transfer.

⁴ 47 U.S.C. § 258.

⁵ The Commission's rules and orders clearly contemplate that a switchless reseller may be a customer's preferred carrier. Therefore, changes to a customer's preferred carrier that do not involve a change in the customer's underlying facilities-based carrier are nonetheless subject to the Commission's authorization and verification rules. See *Section 258 Order* at paras. 145-146; *WATS International Corp. v. Group Long Distance (USA), Inc.*, 12 FCC Rcd 1743, 1752 (1997) (citing *PIC Change Recon. Order*, 8 FCC Rcd at 3218).

⁶ Pursuant to these procedures, a carrier must: (1) obtain the subscriber's written authorization; (2) obtain confirmation from the subscriber via a toll-free number provided exclusively for the purpose of confirming orders electronically; or (3) utilize an independent third party to verify the subscriber's order. See 47 C.F.R. § 64.1150.

⁷ 47 C.F.R. § 1.3.

⁸ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.⁹ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁰ Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.¹¹

5. We find that TXU Communications has demonstrated that good cause exists to justify a limited waiver of the Commission's authorization and verification requirements to the extent necessary to enable TXU Communications to transfer to its own customer base the affected Network Long Distance customers. In the Waiver Petition, TXU Communications states that, on April 1, 2000, it acquired approximately 1,800 customers located predominately in the state of Texas to whom Network Long Distance resold intraLATA, interLATA, and international interexchange services. Since that time, TXU Communications has continued to serve those customers under the Network Long Distance trade name and has made no changes to the customers' services and rates. TXU Communications intends to discontinue use of the Network Long Distance trade name and serve the affected customers under the TXU Communications trade name.¹² Upon discontinuance of the Network Long Distance trade name, TXU Communications will continue to provide resale intraLATA, interLATA, and international interexchange services on a presubscription basis to the former customers of Network Long Distance.

6. We conclude that special circumstances exist to justify a waiver. Without this waiver, some former Network Long Distance customers might temporarily lose service when TXU Communications ceases providing service to customers who fail to respond in a timely fashion to requests for preferred carrier change authorization; those customers might also pay potentially higher casual calling rates after the discontinuance of presubscribed service. We conclude that a waiver of the Commission's carrier change rules and orders is necessary to provide a seamless transition with no disruption of service to the transferred customers.

7. We find that TXU Communications has demonstrated that a limited waiver of the authorization and verification rules is in the public interest because it will prevent consumers from temporarily losing service or paying significantly higher rates, and because TXU Communications has agreed to notify the affected customers as described below. TXU Communications states that it will undertake a two-step process to notify the affected customers of the transfer. In a first letter, TXU Communications will inform customers of the proposed transfer and assure them that no charges or rate increases will be imposed as a result of the

⁹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹⁰ *WAIT Radio*, 418 F.2d at 1157.

¹¹ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

¹² Waiver Petition at 2-3.

transfer.¹³ TXU Communications states that it will also advise the affected customers that they can choose a different preferred carrier, should they desire to do so.¹⁴ In addition, customers will be given a toll-free number to call with any questions they may have about the transition. According to TXU Communications, once the proposed transfer has been consummated, TXU Communications will notify these customers of that event and reiterate the foregoing information, assurances, and advice.¹⁵ TXU Communications has agreed that, if the Commission waives its rules to permit TXU Communications to provide service to Network Long Distance's former customers, TXU Communications will work with the complainants and the Commission to investigate and resolve any outstanding customer complaints regarding services provided by Network Long Distance.¹⁶ We conclude that these conditions will adequately protect the rights of the transferred customers of Network Long Distance.

8. For the foregoing reasons, we grant TXU Communications a waiver of the authorization and verification requirements of our rules for the limited purposes described above. The grant of this waiver is conditioned upon TXU Communications' provision of customer notification and handling of customer complaints, as described above and further detailed in the Waiver Petition, Supplement, and Further Supplement.

III. ORDERING CLAUSES

9. Accordingly, pursuant to authority contained in Sections 1, 4, and 258 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 258, and the authority delegated under sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, the waiver request filed by TXU Communications Telecom Services Company dba TXU Communications on April 14, 2000, and supplemented on June 6, 2000, and June 8, 2000, IS GRANTED to the extent indicated herein.

10. IT IS FURTHER ORDERED that this Order is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

K. Michele Walters

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Associate Division Chief,
Accounting Policy Division,
Common Carrier Bureau

¹³ TXU Communications filed sample notification letters. See Waiver Petition, Attachment A; Further Supplement, amended Attachment B (Notification Letters).

¹⁴ Waiver Petition at 3.

¹⁵ Notification Letters; Waiver Petition at 3; Supplement at 1.

¹⁶ Waiver Petition at 4.